In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-133

OLD DOMINION BOX COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's jury charge and oral opinion are unofficially reported at 30 A.F.T.R. 2d 5677. The opinion of the court of appeals (Pet. App. 1-19) is reported at 477 F. 2d 340.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1973. A petition for rehearing was denied on May 17, 1973. The petition for a writ of certiorari was filed on July 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an issue first raised by petitioner in its amended complaint was barred by Section 7422 of the Internal Revenue Code of 1954.

2. Whether the jury's verdict was supported by substantial evidence.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth at Pet. 3-4 and Pet. App. 21-25.

STATEMENT

Petitioner is a Virginia corporation controlled by members of the Dillard family. In 1959 petitioner sold some of its manufacturing plants and from the profits made a $75,000 contribution to the Dillard Foundation—a family controlled charitable foundation which had been granted an exemption from federal income taxes in 1953. A charitable deduction claimed by petitioner for the contribution was disallowed following an investigation of the Dillard Foundation by the Commissioner of Internal Revenue. That investigation had resulted, in 1965, in the retroactive revocation of the foundation's charitable status because of the Commissioner's determination that the foundation had been operated for the benefit of private interests instead of exclusively for charitable purposes. Petitioner commenced the instant refund suit to recover the additional income taxes (in the amount of $31,796.14 plus interest) which it had paid as a result of the disallowance as a charitable deduction of its $75,000 gift to the Dillard Foundation (Pet. App. 2-3).

In its claim for refund filed with the Commissioner, petitioner set forth the grounds for recovery upon which it relied as follows (Pet. App. 13):

> The disallowance in the tax year ended 1/1/60 of $75,774.69 of charitable contributions made by the * * * [petitioner] to Dillard Foundation, Inc. was

> improper for two reasons: First, the donee was a qualified charitable entity, and, second, the * * * [petitioner] innocently made its contributions in good faith in reliance on the donee's charitable status.

Petitioner's complaint originally was based on the two theories set forth in the refund claim (Pet. App. 13-14). While the suit was pending, but after the period of limitations for filing claims for refund had expired, petitioner amended its complaint to allege that (Pet. App. 14):

> The contribution of $75,000 was intended by the * * * [petitioner] for and was duly received by Lynchburg Fine Arts Center, Inc., which was at all relevant times a charitable corporation within the meaning of said Section 501(c)(3), contributions to which were deductible for Federal Income Tax purposes.

Thereafter, and prior to trial, the government moved in the district court to dismiss petitioner's complaint insofar as it sought recovery on the newly added ground that the contribution in question was intended for the Lynchburg Fine Arts Center for the reason that such ground was not contained in petitioner's claim for refund and constituted an impermissible variance therefrom (Pet. App. 19). The district court denied the government's motion to dismiss, and the case was tried on the basis of the following special interrogatories to be answered by the jury (Pet. 6-7; Pet. App. 7, 11):

> 1. Did the Dillard Foundation operate at all times during the twelve-month period ending November 30, 1959 for religious, charitable, and educational purposes?

2. If the answer to question 1 is "no", was the Dillard Foundation operating for religious, charitable, and educational purposes when the gift of $75,000 was pledged on October 30, 1959?

3. If the answers to both questions 1 and 2 are "no", was the plaintiff an innocent contributor when the gift of $75,000 was pledged on October 30, 1959?

4. If the answers to questions 1, 2 and 3 are "no", was the $75,000 gift intended for Lynchburg Fine Arts Center, Inc., and did it reach the Center?

At the conclusion of the trial, the first three interregatories were answered by the jury in the negative. During the trial, the answer to the fourth interrogatory was conceded by the government to be "yes" and that interrogatory was withdrawn from the consideration of the jury (Pet. 7-8; Pet. App. 7, 11, 13).

After the jury answered in the negative the three special interrogatories submitted to it, the district court determined that petitioner's claim based upon a conduit theory was untimely. Judgment was therefore entered for the government. The court of appeals affirmed (Pet. App. 1-19).

ARGUMENT

1. The court of appeals correctly held that the issue which petitioner attempted to raise in its amended complaint (*i.e.*, that the $75,000 contribution made by it to the Dillard Foundation, Inc., was intended for and reached the Lynchburg Fine Arts Center, Inc., a qualified charitable corporation) was at variance with the grounds for recovery set forth in petitioner's claim for refund and, consequently, that that issue was barred by Section 7422 of the Internal Revenue Code of 1954.

26 U.S.C. 7422. That statute conditions the granting of relief upon the filing of a claim for refund which sets forth in detail each legal ground upon which the refund is claimed and sufficient facts to apprise the Commissioner of the soundness of the claim. Petitioner's claim for refund set forth only two grounds for recovery: (1) that the Dillard Foundation was a qualified charitable entity, and (2) that petitioner innocently made its contribution in good faith reliance on the foundation's charitable status.

Contrary to petitioner's assertions (Pet. 15, 26-27), the claim for refund neither put the Commissioner on notice that petitioner was claiming a refund on the ground that the $75,000 contribution was intended for and ultimately reached the Lynchburg Fine Arts Center, nor did it apprise the Commissioner of any facts sufficient to enable him to pass on such a claim.[1] Indeed, as the court below noted (Pet. App. 18), the allegation in the amended complaint, that the contribution was intended for the Lynchburg Fine Arts Center, was inconsistent with the claim for refund which named the Dillard Foundation as donee of the gift. Accordingly, the decision below, holding that the additional factual allegations pleaded by petitioner in its amended com-

[1]The refund claim contained no mention of the Fine Arts Center and, hence, no suggestion that petitioner was relying on the theory that the Dillard Foundation served only as a conduit to pass the contribution to an exempt foundation. The mere fact that the Commissioner may have been in possession of sufficient documentary evidence to determine the facts upon which petitioner's alternative theory was based (Pet. 27) is immaterial since the impact of those facts was not brought to the attention of the Commissioner during any of the audit procedures leading up to the trial. As the court of appeals noted (Pet. App. 18), it would be unreasonable to require the Commissioner, through his agents, to formulate from raw facts a taxpayer's unarticulated claim.

plaint constituted an untimely and impermissible attempt to shift to a new and different ground for relief, is in full accord with the decisions of this Court. See, *e.g.*, *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293; *United States* v. *Andrews*, 302 U.S. 517, 524. There is no conflict among the courts of appeals on this issue.

2. There is no basis for setting aside the jury's negative answers to the special interrogatories. There was ample evidence in the record to support the jury's findings that, during the times pertinent to this case, the Dillard Foundation was not operating for charitable purposes and that this fact was known by petitioner (see Pet. App. 3-6, 8-10, 11-12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

BENNET N. HOLLANDER
ROBERT S. WATKINS,
Attorneys.

SEPTEMBER 1973.

[003-1973-09]